

ADDRESS BY SENATOR STROM THURMOND (D-SC) TO HARVARD LAW SCHOOL FORUM, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS, DECEMBER 6, 1957, AT 8:00 P.M.

CONSTITUTIONAL GOVERNMENT

I am happy to have this opportunity to speak on the subject of Constitutional Government. I am particularly happy to be able to do so at the Harvard Law School. For it is here at Harvard that so much has been done, and that so many have labored in the never-ending fight to insure that the precious heritage of our constitutional rights shall be preserved intact for the future.

The list of those associated with the Harvard Law School and Harvard University who have labored zealously in behalf of the precious rights to the individual is a long and impressive one.

I wish to impress upon you fully, at the outset, that I have a full awareness and that the people of the South have a full awareness of the vital importance of preserving the constitutional rights of the individual -- that is, civil liberties. I emphasize this point, because I do not want what I am going to say tonight to be taken in any way as an attempt to minimize the importance of the efforts which have been made toward safeguarding the rights of the individual citizen.

But I do want to make myself clear on this: In order to be true defenders of the Constitution, true supporters of constitutional government in the fullest sense, it is necessary that we look at the entire Constitution and defend all of it, and not merely certain sections which best suit our own political or social views. We cannot be selective in our approach to the Constitution. Yet it is my feeling--and I think that there will be general agreement on this point--that many great liberal minds, here at Harvard as elsewhere, have tended, in their efforts in behalf of constitutional government, to emphasize the rights of the individual, the individual's civil liberties.

Important as this aspect of constitutional government is, it should not be stressed to the point of neglecting--or actually disparaging--other important aspects of the Constitution. It is about one such vital facet of the Constitution which has not only been neglected but has actually been deliverately whittled away (often, sad to say, directly because of the emphasis on individual rights), that I wish to speak tonight.

I should like to pause here a moment to note that the motto which appears on the shield, or arms, of this great University is VERITAS--truth. Let us all bear that word in mind when we set out to examine the Constitution. Let us be dispassionate in our approach to this basic document of our political system. Regardless of our personal feelings as to politics, race, or ideology, let us look the Constitution squarely in the face. Let us admit this fundamental truth about the Constitution: namely, that in addition to its concern with the rights of the individual citizen, the Constitution looks also to the rights and integrity of the several States.

By no fair view of the Constitution are the States supposed to be mere administrative sub-divisions of an all-powerful central government, exercising whatever powers they may have strictly at the sufferance of the central government. Yet that stage is rapidly being reached and, curiously and tragically, seems almost to be promoted by many of those who, where the individual's rights are concerned, are the quickest to proclaim the sanctity of the Constitution. Whatever one's views on the current social and political issues, fairness and truth demand that this fundamental concept be kept in mind: these States are STATES and not mere provinces.

The very bedrock of the Constitution is its establishment of our dual system--the division of powers between the States and the Federal Government. The second major feature of the Constitution is the tripartite principle, that is, the principle of the independence of the three branches of the Federal Government. These two devices together make up the system of checks and balances which the Founders strove to provide, in order that no tyrannical power-apparatus should ever be created in America.

The wisdom of the checks-and-balances system seems so obvious that it is scarcely believable that it should at this day need any advocacy or defense. Yet in recent years men apparently have been willing, in order to obtain some temporary (and usually illusory) advance in the field of individual rights, to jeopardize this entire intricate structure, so vital to all our freedoms. When men fall into this error, they not only violate to the very core the Constitution which they claim to serve, but, in the long view, they also place the precious human rights of the individual in the greatest jeopardy possible. For individual rights are in the most mortal danger when a power-apparatus has been built up which has no checks, no balances, which relies solely on the discretion of the men who happen to be in control of it. The importance of the checks-and-balances system and of strict adherence to constitutional methods

has probably never been better expressed than by President George Washington who, in his Farewell Address, declared as follows:

"The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions of the others, has been evinced by experiments ancient and modern; some of them in our country, and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution, or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield."

The protestations of certain so-called "liberals" to the contrary notwithstanding, the greatest bulwarks of individual rights and freedoms in the long run are the twin principles of States' Rights and independence of the three branches of government. The genuine liberal who is truly interested in buttressing the rights of the individual and our precious civil liberties can best do this, first, by fighting with all his might to preserve the rights and integrity of the States, and, secondly, by resisting firmly any and all attempts on the part of any one of the three branches of the Federal Government to usurp the powers of one of the other branches.

At this point, it seems to me to be peculiarly appropriate to remember the eloquent statement by an alumnus of this University, the late President Franklin D. Roosevelt, who gave this forceful warning:

"...to bring about government by oligarchy masquerading as democracy, it is fundamentally essential that practically all authority and control be centralized in our National Government. The individual sovereignty of our states must first be destroyed, except in mere minor matters of legislation. We are safe from the danger of any such departure from the principles on which this country was founded just so long as the individual home rule of the States is scrupulously preserved and fought for whenever it seems in danger."

Since, then, an honest and true appraisal of the Constitution requires us to protect the rights of the States as well as the rights of the individual, let us shift our attention for a moment away from those sections of the Bill of Rights dealing with the individual which have received so much attention in recent years--such as the First and Fifth Amendments--to the Tenth Amendment.

The Tenth Amendment has been sadly neglected. It has received little attention from the modern-day liberal, and very little support from any source (outside the South) in the recent past. One former justice even went so far as to dismiss the Tenth Amendment as a "mere truism".

The Tenth Amendment is not a mere truism. It was not included in the Bill of Rights just to bring the number of amendments to a round ten. It was put there for a purpose, to give emphasis and clarification to the fundamental nature of the Constitution and thus to reassure the States. The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". In other words, the only powers possessed by the Federal Government are those which were, by means of the instrument known as the Constitution, delegated to it.

Nowhere in the Constitution, nor in any Amendment thereto, is the Federal Government given any power in the field of public-school education. This is one of the fields that is reserved to the States. Public-school education has been universally acknowledged as being peculiarly within the province of the State and local governments. For the Federal judiciary now to arrogate unto themselves control over the basic educational policies of the States, to the extent of usurping the administrative function of determining what child, or classes of children, shall attend which schools, is to do grave violence to the Constitution.

Now, to this argument some will reply that, whatever the facts as to the Tenth Amendment, the Federal courts were given the powers which they are now seeking to exercise in the educational field, by the adoption of the Fourteenth Amendment.

Let me say that I am not here to discuss the history of the Fourteenth Amendment, nor to raise the question of whether, in the light of the force and fraud and peculiar circumstances surrounding its purported "adoption", this Amendment has ever really been legally incorporated into the Constitution. This question has been thoroughly and ably dealt with by many scholars and many political writers--recently, among others, by the distinguished editor and

columnist, Mr. David Lawrence. Regrettably, the correctness of their conclusions runs up against the hard facts of political life and the likelihood that, should the South plead in court the illegality of the Fourteenth Amendment, the court would evade the question as being: "not justiciable". In any event, for the purposes of this discussion, we need not raise the question of the legal existence of the Fourteenth Amendment.

I say "we need not", for this reason. Even those who accept the Fourteenth Amendment without a qualm, even those who classify themselves as unquestioning followers of John Marshall and Alexander Hamilton, in short, even the most ardent Federalists should view with grave concern the decision of the Supreme Court in *Brown v. Board of Education*. They should also view with concern the decisions in several other cases of the past few years and, for that matter, the entire recent trend of the Federal judiciary.

For we have here a serious question, a grave question, of usurpation of power. That this trend on the part of the judiciary would eventually arise was forecast long ago by Thomas Jefferson, when he declared:

"It has long, however, been my opinion... that the germ of dissolution of our Federal Government is in the Constitution of the Federal judiciary. An irresponsible body...working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction until all shall be usurped from the States and the government of all be consolidated into one."

This usurpation must be resisted. Responsible citizens have long been aware that the judiciary can no more be given free rein than either of the two other branches of government. But, blinded by widespread misconceptions as to the role of the Supreme Court and by such cliches as "The Constitution is what the Supreme Court says it is", the people have failed to maintain any adequate checks or safeguards against encroachment by the Federal judicial branch.

These safeguards must be provided, these checks must be maintained, if we are to remain a free people. In the words of the late John W. Davis, one of the greatest constitutional lawyers our country has produced:

"Americans can be free so long as they compel the governments they themselves have erected to govern strictly within the limits set by the Bill of Rights. They can be free

so long, and no longer, as they call to account every governmental agent and officer who trespasses on these rights to the smallest extent. They can be free only if they are ready to repel, by force of arms if need be, every assault upon their liberty, no matter whence it comes."

As citizens, and especially as lawyers, we have a duty to repel these assaults on our liberty made by the Federal judiciary. As citizens and as lawyers, we have a duty to see to it that there shall be no docile acceptance of any Supreme Court ruling which clearly and palpably violates the intent of the Framers of the basic law, no acceptance of any so-called 'interpretation' of the Constitution which amounts to judicial legislation.

In this connection, while on the subject of intent as a limitation on the interpreting power, I wish to quote at some length from an editorial which appeared not long ago in the Saturday Evening Post (issue of 8 June 1957). The editorial was written by the Honorable Hamilton A. Long, a distinguished authority on the Constitution and a member of the New York Bar.

"Few subjects are surrounded by more confusion than the function of the United States Supreme Court in interpreting the Constitution. There can be no doubt, however, that the Court has no right to change this basis law or to violate the intent of those who initially adopted it or of those who later amended it. Only the people can change the Constitution, by amendment.

"For the Supreme Court to try to bypass this process, by interpreting the Constitution contrary to that original intent, is to usurp power never given it.

....

"Although the Constitution has not been amended to increase Federal power's since 1920, the Supreme Court in 1937 abandoned its policy of respecting the original intent of the Constitution--as amended--in defining them.

"...Many of these increases (in Federal power) might have been made eventually, but the proper method to make them is provided in the Constitution and should have been followed. For the Court to attempt to make them by 'interpretation' is government by usurpation, the opposite of constitutionally limited government.

....

"...This generation, like those which preceded it, is the custodian of the liberties of the people and the restraints on government power which alone can protect them. When we permit judges to 'interpret' these guarantees so as to make them ineffective, we help sabotage our own and posterity's liberties."

The duty of members of the bar is to uphold, not all Federal laws and decisions, but those (and only those) made "pursuant to the Constitution". No reasonable man can construe a decision as being made "in Pursuance thereof" where the Supreme Court's "interpretation" violates the plain and obvious intent of the Framers and Adopters--as the school segregation decision (Brown v. Board of Education) completely violates, beyond any real dispute, the plain intent of those who brought into being the Fourteenth Amendment.

Decisions which are not rendered pursuant to the Constitution, like Federal laws which do not conform to the Constitution, are acts of usurpation. It is the duty of members of the bench and bar to speak out against these acts of usurpation instead of, by silent acquiescence, lending them support.

In these troubled times, when our judicial system is floundering and the Constitution is in grave danger, it would be well for all of us to remember these words, from a letter of opinion by the Honorable J. Lindsay Almond, then Attorney-General and now Governor-elect of the Commonwealth of Virginia:

"Under our constitutionally ordained system of government,...I draw and adhere to a basic and fundamental distinction between that which issues from and under the authority of the Constitution and that which is created through usurped power under the pretended color of but ultra vires of the Constitution. That authorized by the Constitution is de jure law and binding. That not authorized is de facto law and binding only through the sheer force of power..."

The segregation decision, Mr. Almond goes on to say,

"...is devoid of constitutional derivation or support. As hereinabove pointed out, it is presently binding by virtue of superior force shackled upon a sovereign State through usurpation of authority and arrogation of power transcending the Constitution of the United States, and in abnegation of every apposite legal precedent known to American Jurisprudence."

I have dealt at some length with the subject of usurpation by the Judicial branch. I do not, however, wish to give the impression that it is from the judiciary alone that we need fear attempts to infringe upon our freedoms and do violence to the Constitution. Serious offences against the basic law have been committed in recent months by both the other branches of the Federal Government--the Executive and the Congress.

In the case of the Executive, of course, I am alluding to the President's action of two months ago in ordering Federal troops to occupy the capital city of one of our sovereign States. I have been unable to find any constitutional or statutory authority giving the President the right to use Federal troops in the enforcement of a court order not based on a law of the United States, that is, an Act of Congress. Due to the fact, however, that it was my original intention to discuss with you tonight another aspect of this problem--the Civil Rights Bill--, I would rather defer discussion of the troop question until I have an opportunity to devote more time to that subject, which from a legal standpoint is a very intricate one.

The violation of the Constitution which I should like to discuss with you at this time is the passage last summer, by the Congress, of the so-called civil rights bill, H R 6127.

This bill, as finally passed by Congress and signed by the President, contains several objectionable features, some of which in my opinion render it unconstitutional. That the bill is unconstitutional is in itself, of course, more than sufficient reason for opposing it--and I opposed it all the way in the Senate, and still oppose it. But, in addition to being unconstitutional, this bill was also both unnecessary and unwise; and before going into the question of its unconstitutionality, I should like to take a few moments here to discuss these other objectionable qualities.

First, as to why this bill was unnecessary.

The right of all qualified citizens to vote is protected by law in each of the 48 states, and by Federal laws where applicable. I refer you, for example, to Title 18, Section 594 of the United States Code, which reads as follows:

"Whoever intimidates; threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice-President, Presidential elector, Member of the Senate, or

Member of the House of Representatives, Delegates or Commissioners from the Territories and Possessions, at any election held solely or in part for the purpose of electing such candidate, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

If anyone should try to claim that these long-standing laws are inadequate, I think that a review of the facts and statistics should be sufficient to rebut their contention. According to recent figures, Negro registration in the Southern States has risen sharply since 1952, to a total of 1,238,000 in 1957. If that figure seems small compared to the total number of Negroes of voting age in the South, I suggest that, before rushing to accuse Southern registrars of wholesale fraud or intimidation, our critics should remember that not only do many Negroes fail to meet the basic voting qualifications which are applied alike to members of both races, but also that many Negroes simply lack sufficient political consciousness to spur them on to participate in political and civic affairs. I might point out here that a great number of those who lack this political consciousness probably also lack certain other qualities prerequisite to casting a truly intelligent ballot, and thus that the cause of good government would not necessarily be served by a sudden vast swelling of the registration lists through artificial politically-inspired stimuli.

Proof that Negroes were voting in the South in substantial numbers years prior to the passage of the Civil Rights Bill can be found in an article which was published in a Columbia, South Carolina, newspaper, following the general election of 1952.

The November 8, 1952, issue of The Lighthouse and Informer, a newspaper published by and for Negroes carried an analysis of the election in South Carolina. A story which appeared on page one read as follows:

"...There was no doubting that South Carolina's Negro voters were the only reason the State managed to return to the Democratic column.

"Late figures Wednesday afternoon gave Governor Adlai Stevenson 165,000 votes and General Swight D. Eisenhower 154,000. Some 9,000 other votes were cast for the Republican Party for General Eisenhower but cannot be added to the 154,000 cast by South Carolinians for Eisenhower.

"The more than 330,000 votes counted in 1,426 of the State's 1,563 precincts represented

represented the largest cast in the State since Reconstruction days.

"Estimates placed the Negro vote at between 60,000 and 80,000 who actually voted..."

Those are the words of the newspaper, not mine. I have no doubt that the Negro vote in the 1952 general election and the one in 1956 was heavy in South Carolina. The reports which came to me indicated a large turnout.

Second, as to why this Civil Rights Bill is unwise.

Part I of the bill, providing for the creation of a Commission on Civil Rights, is a good place to start. I could spell out a number of strongly objectionable and unwise features regarding specific subsections of this Part I, and I did so on the floor of the Senate, but in view of considerations of time, I shall confine myself to this general observation as to the unwisdom of establishing this Commission.

The Commission can go far afield from a survey on whether the right to vote is protected. Through the power granted in Section 104 (a) of Part I, the Commission could exert its efforts by indirect means, toward bringing about integration of the races in the schools and elsewhere. In so doing, the Commission would be bound to create further suspicion and tension between the races.

Unbiased persons who are familiar with the segregation problem, and who have observed the detrimental result of the Supreme Court decision, know that a traveling investigating commission not only is unnecessary, but that it could, in concert with a meddling Attorney General, bring about chaos in racial relations. To bring about such a situation in our country is certainly not the part of wisdom,--even if it be the part of practical politics in certain big-city States.

There are several grounds on which this bill has been challenged as unconstitutional. These range from questions of unconstitutional delegation of Congressional powers, through what possibly amounts to double jeopardy, on down to the lack of a guarantee of jury trial in cases which are criminal in nature. Under this bill, State administrative remedies will be abrogated; the Attorney-General will be empowered to proceed on suspicion, against "persons about to engage" in certain activities; and suit may be filed on behalf of persons not requesting the same. I shall not engage in a detailed discussion of every one of these points. Suffice it to say that, even those features which may not actually be unconstitutional are at least hardly consonant with established ideas of judicial administration. I should

like, however, to take a few moments at this point to emphasize some facts in regard to one aspect which clearly involves a violation of the Constitution, namely, the question of the right to jury trial--a right which has been severely abrogated by the terms of the final, so-called compromise, version of the Civil Rights Bill.

In my view, this so-called compromise is no less than an attempt to compromise the United States Constitution itself.

In effect, it is an illegal amendment to the Constitution because that would be the result insofar as the Constitutional guarantee of trial by jury is concerned.

Article III, Section 2, of the Constitution provides that:

"The trial of all Crimes" -- I repeat, all -- "except in Cases of Impeachment, shall be by Jury...."

Again in the Sixth Amendment -- in the Bill of Rights-- it is provided that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fifth and Seventh Amendments to the Constitution provide additional guarantees of action by a jury under certain circumstances. The Fifth Amendment refers to the guarantee of indictment by a grand jury before a person shall be held to answer for a crime. The Seventh Amendment guarantees trial by jury in common law cases.

These guarantees were not included in our Constitution without good and sufficient reasons. They were written into the Constitution because of the abuses against the rights of the people by the King of England. Even before the Constitution and Bill of Rights were drafted, our forefathers wrote indelibly into a historic document their complaints against denial of the right of trial by jury.

That document was the Declaration of Independence.

After declaring that all men are endowed with certain unalienable rights, including life, liberty, and the pursuit of happiness, the signers of the Declaration pointed out that the King had a history of "repeated injuries and

usurpations, all having in direct object the establishment of an absolute tyranny over these States." Then they proceeded to the listing of a bill of particulars against the King.

He was charged with "depriving us in many cases of the benefits of trial by jury."

When our forefathers won their freedom from Great Britain, they did not forget that they had fought to secure a right of trial by jury. They wrote into the Constitution the provisions guaranteeing trial by jury. Still not satisfied, they wrote into the Bill of Rights two years later the three specific additional provisions for jury action.

The specific provisions in the Constitution and the Bill of Rights guaranteeing trial by jury have not been repealed. Neither have they been altered or amended by the Constitutional methods provided for making changes in our basic law if the people deem it wise to make such changes.

Nevertheless, in spite of the prevailing Constitutional guarantee of trial by jury, we are here presented with a proposal which would compromise the provisions of the Constitution--yes, in my opinion, amend the Constitution illegally.

This compromise provides that in cases of criminal contempt, under the provisions of this act, "the accused may be tried with or without a jury" at the discretion of the judge.

It further provides:

"That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of \$300 or imprisonment in excess of 45 days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury..."

The first of the provisions I have just cited, giving discretion to a judge whether or not a jury trial is granted in a criminal case, is in direct conflict with the Constitution.

The Constitution does not provide for the exercise of any discretion in a criminal case as to whether the person accused shall have a jury trial. The Constitution says "The trial of all crimes except in cases of impeachment shall be by jury."

The Sixth Amendment says, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

The Constitution makes no exception to the trial by jury provision in criminal cases in the event contempt is involved. Let me repeat and let me emphasize. The Constitution says, "The trial of all crimes shall be by jury"--not all crimes except those involving contempt, but all crimes.

What power has been granted to Congress to agree to this proposal to compromise the constitutional right of trial by jury? The only way to amend the Constitution is by the amending process as set forth in the instrument itself. As the directly elected representatives of the people, the Congress should have been the last body to attempt to infringe upon this authority which the Constitution vests solely in the people. Yet we have seen them do so, and apparently with the approbation of many segments of the public which ought to know better.

I have dealt long enough, I think, on this particular case of undermining our Constitution. I simply wished to show, by mentioning these three examples--the segregation decision, the use of troops by the Executives, and the Civil Rights "compromise", that all three branches of government have been guilty, in the recent past, of offences against the Constitution.

We are indeed at a late hour to defend our liberties. Much of our constitutional structure has been already eroded away. So much the more urgent, then, that we re-dedicate ourselves to the cause of constitutional government, and that we do so now.

Earlier in this address, in urging that we be fair and true in examining and upholding the Constitution in its entirety instead of in a selective fashion, I mentioned that word VERITAS which appears on the shield of this University. This brings to my mind another simple, short inscription, one which stands out in bold letters on the base of the tallest monument in the city of Charleston, South Carolina. The words read:

TRUTH, JUSTICE, AND THE CONSTITUTION

The monument is that of John C. Calhoun, South Carolina's, and probably America's, foremost political thinker, a man who strove with all his power to preserve the Union. The position of Calhoun is basically the position of the Southern States today: All that they ask--and on this much they insist--is Truth, Justice, and the Constitution; but when they say the Constitution, they mean the whole Constitution, not just

those selected portions which protect individual rights and civil liberties, but also those basic portions which protect the integrity and rights of the several States, which are themselves in the long run the surest bulwarks of the people's rights and freedoms.

--THE END--